Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

UDO BIRNBAUM

Petitioner

v.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL, CHRISTINA WESTFALL, STEFANI PODVIN

Respondents

On Petition For Writ Of Certiorari To the Supreme Court of Texas

---

PETITION FOR WRIT OF CERTIORARI

UDO BIRNBAUM, PRO SE
540 VZCR 2916
Eustace, TX 75124
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F/O

QUESTIONS PRESENTED

1. Whether a person without a lawyer, filing a pleading in a Texas court under U.S.C. § 1964(c), ("civil RICO"), can be sanctioned as much as $62,885 merely because the evidence is found to be insufficient to show his claim.

2. Whether such person's civil RICO claim can be kept from the jury, and the TRIAL JUDGE himself just FIND that the evidence does NOT indeed show such civil RICO claim as pleaded, and impose such sanction of as much as $62,885?

3. Whether the Texas Supreme Court in upholding such $62,885 sanction sets a dangerous precedent that is in conflict with the purpose of the civil RICO statute.

4. Whether the Texas judges upholding such $62,885 sanction knew that they were acting in violation of the Constitution, yet did it anyway, and whether such conduct rises to the level of judicial terrorism and a threat to America.

THE PARTIES

Udo Birnbaum *Petitioner*	Udo Birnbaum, Pro Se 540 VZCR 2916 Eustace, TX 75124
The Law Offices of G. David Westfall, P.C.	Frank C. Fleming 6611 Hillcrest Ave. #305 Dallas, TX 75205
G. David Westfall	Frank C. Fleming
Christina Westfall	Frank C. Fleming
Stefani (Westfall) Podvin *Respondents*	Frank C. Fleming

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OPINIONS BELOW

The Texas Fifth Circuit Court of Appeals opinion is published as *Birnbaum v. Law Offices of G. David Westfall, P.C.*, 120 S.W.3d 470, 476 (Tex. App.-Dallas 2003, pet. Filed) **(App.1)**. Documents in the trial court are unpublished.

JURISDICTION

Petitioner seeks review of a certain $62,885 sanction **(App. 16)** imposed by a Texas district court because the evidence was found **(App. 12)** not to support his claim under 18 U.S.C. § 1964(c), "civil RICO".

The Texas Supreme Court last denied the appeal for rehearing on May 21, 2004 **(App. 14)**. This petition was filed within ninety days after that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The state district court had jurisdiction over civil RICO under this Court's *Tafflin v. Levitt*, 493 U.S. 455 (1990). Constitutional and due process issues were timely raised in the trial, appeal, and state supreme court as indicated below.

CONSTITUTIONAL PROVISIONS

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without **due process of law**; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**.

STATUTORY PROVISIONS

18 U.S.C. § 1961 et seq. ("RICO") provides, in relevant part:

18 U.S.C. § 1962(c):
"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1964(c), "civil RICO":
"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Note: State courts have concurrent jurisdiction to consider civil claims arising under RICO. *Tafflin v. Levitt*, 493 U.S. 455 (1990)

STATEMENT OF THE CASE

Introduction

This petition is about FREE SPEECH, Fifth Amendment DUE PROCESS, and STATUTORY LAW.

Petitioner Birnbaum seeks relief for himself, and others similarly situated, to be free from fear of UNLAWFUL punishment of as much as $62,885 **(App. 12)** for representing themselves in Texas courts.

Specifically at issue in this petition is the following sanction **(App. 16)**:

> *THE COURT: "In assessing the [$62,885] sanctions, the Court has taken into consideration that although Mr. Birnbaum may be **well-intentioned** and may believe that he **had** some kind of real claim as far as RICO there **was** nothing presented to the court in any of the proceedings since I've been involved that suggest he **had** any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate".*
> Transcript, close of Sanctions Hearing, July 30, 2002. (emphasis added) **(App. 12)**

Specifically, Birnbaum seeks relief to be free to make claims and defenses under 18 U.S.C. § 1964(c) ("civil RICO") when one is fraudulently sued in a Texas court.

Filing a lawsuit is constitutionally protected conduct. Unconditional punishment, for a completed act, is criminal in nature, requiring full criminal process, including a finding of "beyond a reasonable doubt", by a jury. Civil RICO is

statutory law, and state courts have jurisdiction over civil RICO under this court's *Tafflin v. Levitt*, 493 U.S. 455 (1990)

This $62,885 sanction judgment **(App. 16)** is NOT a matter of an erroneous ruling or finding by a Texas court, NOT with all the briefing and petitions for rehearing that went to the Texas courts, as shown below, but an indication of a more systemic problem regarding constitutional rights and due process, rising to the level of an "important issue of law".

In essence, the Texas 294th District Court, the Texas Fifth Court of Appeals, and the Texas Supreme Court, using various Texas legal procedures and doctrines, have decided an important federal question in a way that conflicts with relevant decisions of this Court.

Facts material

Petitioner Birnbaum was sued in the Texas 294th District Court of Van Zandt County by a The Law Offices of G. David Westfall, P.C. ("Law Office") claiming $38,121.10 "worth" of legal services in bringing suit under the anti-racketeering statute 18 U.S.C. § 1964(c) ("civil RICO") against ten defendants (including the very district judge in whose court they brought this case!), two senior judges, an ex-district judge, two lawyers, and assorted court personnel.

The civil RICO suit alleged a scheme of condoning frivolous lawsuits, such as the one where Birnbaum had been sued because BEAVERS had built a dam on his farm.

Judges are of course for all practical purposes immune from suit for damages, yet the lawyer had written to Birnbaum, *"you have a very good case"*. Now the lawyer

was claiming $38,121.10 worth of "legal services" performed on "open account", when there was NO open account at all, only a $20,000 prepaid non-refundable retainer agreement *"for the purpose of insuring our availability"*, and *"We reserve the right to terminate our attorney client relationship for any of the following reasons: 1) Your non-payment of fees or costs"*, etc., clearly NOT in the category of an "open account", with the required elements of sales and delivery.

Petitioner Birnbaum answered by denying such alleged "open account" under oath, asserted defenses of FRAUD, counter-claimed under the Texas Deceptive Trade Practices Act (DTPA), and made cross and third party claims under 18 U.S.C. § 1964(c) ("civil RICO") against three (3) persons associated with the "Law Office" (G. David Westfall, Christina Westfall, and Stefani [Westfall] Podvin, "The Westfalls"), and asked for trial by jury.

Birnbaum also moved for APPOINTMENT OF AN AUDITOR per RCP Rule 172 to investigate and report on the alleged OPEN ACCOUNT to show that there existed no open account at all, nor systematic records, etc. as claimed, but only a $20,000 prepaid non-refundable retainer paid to lawyer G. David Westfall.

The Proceedings Below

(When the federal questions were raised, the manner, disposition, and quotations)

Supreme Court Rule 14(1)(g)(i):

> "If review of a state-court judgment is sought, ... when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way

> in which they were passed on by those courts; and pertinent quotations ... ... the places in the record where the matter appear ... ... so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

Birnbaum first raised a federal statutory issue by the very nature of his counter-claim under 18 U.S.C. § 1964(c), "civil RICO" per his right to do so in state court per this Court's *Tafflin v. Levitt*, 493 U.S. 455 (1990).

As for FIRST AMENDMENT and DUE PROCESS issues, below is just a partial list of when and in what manner these constitutional issues continued to be raised. The below are DIRECT QUOTES from the indicated documents, all emphasis as in original:

Federal questions raised in the state trial court

Udo Birnbaum's Amended Third Party Plaintiff Civil RICO Claim --July 11, 2001

Issue: FIRST AMENDMENT, DUE PROCESS, and STATUTORY FEDERAL LAW ("civil RICO"):

> "Birnbaum, in asserting his Civil RICO claim, is in conformance with the Congressional intent of Civil RICO as established by the Supreme Court of the United States *in Rotella v. Wood et al. (2000)*, i.e. a "congressional objective [in enacting Civil RICO] of encouraging civil litigation not merely to compensate victims but also to turn them into private attorneys general, supplementing Government efforts by undertaking litigation in the public good".

Disposition: **DENIED. $62,885 FINE. (App. 16)**

The trial judge would not let Birnbaum show his claim to the jury , ruled that the evidence did NOT show a civil RICO claim **(App. 12)**, issued summary judgment **(App. 11)** , ruled Birnbaum "well-intentioned" **(App. 12)**, and sanctioned Birnbaum $62,885 **(App. 16)**. (See quotation page 3)

Supplement To Motion For Appointment Of Auditor - Jan. 8, 2001

Issue: DUE PROCESS

> "Defendant [Birnbaum] moves this Court for appointment of an auditor under Rule 172 RCP (Texas Rules of Civil Procedure) to make a finding for the Court upon the claim of a pattern of fraudulent accounting practices by Plaintiff, The Law Offices of G. David Westfall, P.C."

Disposition: Motion **DENIED** without explanation.

Petition for Writ of Mandamus - to appoint auditor, to permit civil RICO claim -- Nov. 7, 2001, *Texas 12th Court of Appeals, No. 12-01-00281-CV*

Issue: DUE PROCESS, STATUTORY LAW (right to make "civil RICO" claim)

The issues as presented to the Texas 12th Court of Appeals:

> "ISSUE 1: Whether failure to appoint an auditor per Rule 172 RCP is a violation of duty imposed by law that cannot be remedied by appeal"
>
> "ISSUE 2: Whether not following summary judgment rules is a violation of duty imposed by law that cannot be remedied by appeal"
>
> "ISSUE 3: Whether the judge weighing the summary judgment evidence is a violation of duty imposed by law that cannot be remedied by appeal"

"ISSUE 4: Whether the judge granting "RICO Relief" is a violation of duty that precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really means"

"ISSUE 5: Whether the judge not providing due process is a violation of duty imposed by law that cannot be remedied by appeal"

Disposition: **DENIED** without explanation.

Position Supporting Recusal of Judge Banner -- Sept. 30, 2001 - Motion to Recuse "visiting" Judge

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"In any case, I am entitled to a judge who will abide by the **law of the land** and who does not give the perception of being fundamentally opposed to civil RICO. I ask for Judge Banner's removal from this cause, to be replaced by an unbiased judge, before I am **unlawfully** further entangled in this Court."

"It is time for this Court, under the circumstances of this case, to call on the Justice Department to bring an end to the Westfall Bunch's racketeering and their hijacking of the judicial process in this Court."

Disposition: Motion **DENIED**. Birnbaum ultimately gets **FINED $62,885** by this judge. **(App. 12, App. 16)**

Birnbaum's Response To [The Westfalls'] Motion For Sanctions -- May 10, 2002.

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"COMES NOW Udo Birnbaum in response to the "facts" and "actions" issues raised by ***[The Westfalls'] Motion for Sanctions***, to show that justice requires that these

issues be determined by the **U.S. Justice Department**, because this Court has no investigative capability." "Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the **U.S. Justice Department**."

Disposition: Birnbaum **FINED $62,885. (App. 16, 12)**

Closing Pleading in Writing -- July 30, 2002

Filed, recited at hearing on Motions for Sanctions. **(App. 18)**

Issue: FIRST AMENDMENT, DUE PROCESS

"It is now clear to me that the entire matters I have been subjected to in this Court is retaliation by official oppression for having spoken out on an issue of great public importance, namely rampant corruption and lawlessness in Judge Tommy C. Wallace's 294th District Court."

Disposition: Judge "weighs" the evidence, finds Birnbaum **"well-intentioned"**, yet **$62,885 FINE** against Birnbaum

Motion To Reconsider The $62,885 'frivolous lawsuit' Sanction -- Aug. 19, 2002

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"In my responses [to the motion for sanctions] I pleaded that *"Only the U.S. Justice Department can determine whether the Westfalls were indeed running a racketeering enterprise ... ... as Birnbaum complains", and that "Birnbaum has a First Amendment right to speak out against public corruption as he sees it, without fear of retaliation masquerading as 'sanctions'."*

"This Court was no more entitled to weigh the evidence to make a finding that there was no RICO violation, **and sanction me**, than it was entitled to find that there was a RICO violation, **and throw the**

Westfalls in jail. The Court has no investigative capability. Hence my call for the **U.S. Justice Department**."

"I am being punished for the sins of this entire proceeding. If, after reconsideration, this Court still feels that what I did was so sanctionable, **please advise me as to other views I am also not allowed to voice, whether to this Court, on Appeal, or elsewhere, lest I unknowingly risk being subjected to further sanctions**."

Disposition: **NO RESPONSE** from the court.

Request For Findings Of Fact And Conclusions Of Law *-- filed Sept. 3, 2002. Emphasis as original.*

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"WHEREFORE, Udo Birnbaum requests the Court to **file findings of fact and conclusions of law** as to exactly what the Court found that he did that was so wrong as to incur **a $62.885.00 "frivolous lawsuit" sanction**, when he did not even bring this suit, and specifically upon the central issue regarding this Judgment ("racketeering" vs. "frivolous") as alleged to this Court in the Westfalls' *Motion for Sanctions* and in my *Response* thereto, i.e. whether:

"Regarding my civil RICO claim and cross-claim, and **absent a finding of fact by a jury** (that I had indeed **not** been damaged by reason of a RICO violation), **what conclusions of law**, if any, and **what findings of fact**, if any, this Court made to **adjudicate the sanction issue of fact**, i.e. whether there was a bona fide ***"pattern of racketeering activity" by the Westfalls***, just as I was trying to show, or whether my claims were indeed ***"frivolous"***.

"(plain English: How did Your Honor arrive at a finding on this central issue, an issue I had asked to be resolved by jury?)"

"This is the second suit in which I have been run over by lawyers and judges in this Court, and I have come to recognize the retaliation by Official Oppression that has come upon me for having spoken out on corruption in Tommy Wallace's 294th District Court, as I pleaded at the sanction hearing "trial" of July 30, 2002.
"I did not bring this suit! I did not bring the other one either!"

Disposition: **NO RESPONSE** from the judge.

***Notice of Past Due findings of Fact and Conclusions of Law -- Oct. 1, 2002* (App. 19)**

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"Your Honor, please let the record know what ***findings of fact***, and ***conclusions of law*** you made to come up with the **two** judgments you awarded against me in this case:

"1. How, upon a pleading of an **unpaid open account**, and absent a finding to you by an Auditor under RCP Rule 172 regarding such claimed **unpaid open account**, and absent a finding by a jury as to the **state of the account**, what ***findings of fact***, and what ***conclusions of law*** did you make to award a judgment totaling **$59,280.66** against me upon such pleading, **an issue I had asked to be resolved by jury**?"

"2. How upon my cross and counter claim under 18 U.S.C. § 1961, *et seq.* ("civil RICO"), against three (3) persons, and having **dismissed such**

> **three (3) persons** on November 13, 2001, what ***findings of fact*** and what ***conclusions of law*** did you **now make**, on August 21, 2002, so as to entitle these **dismissed** parties to a **$62,885.00** second judgment against me, in the same case, on **an issue I had asked to be resolved by jury**?"

Disposition: **NO RESPONSE** from the judge

Federal questions raised in the appeals court

Texas Fifth Court of Appeals No. 05-02-01683-CV.

Brief for Appellant -- April 22, 2003

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

> "As shown above, not only the two judgments, but the entire process was lawless. If there is a problem that any judge has in complying with the objectives of civil RICO as interpreted by the Supreme Court of the United States ("private attorneys general")[1], he has the right to recuse himself. If there is a judge who is concerned about being the one opening up Pandora's box in Texas district courts with civil RICO, because the Texas Rules of Civil Procedure do not allow early dismissal by a rule such as federal rule 12(b)(6) for "failure to state a claim", let him recuse himself.
>
> **"But a trial judge does not have the right to take it out on me for following the Supreme Court's urging that victims injured "by reason of a violation" of RICO file civil RICO claims. I am entitled to a new trial by a judge who will abide by the law and the rules of procedure."**

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[1] *Rotella v. Wood et al.* 528 U.S. 549 (2000)

"Assessing a [criminal] punishment of $62,255 for having made a civil RICO defense is NOT "OBJECTIVELY REASONABLE", and especially so in light of a finding that ***"Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim"***.

Disposition: The appeals court DID NOT TOUCH THE ISSUE OF **UNLAWFUL. (App. 1)**

The appeals court DID find that, *"We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of Rule 13"*, and then goes on that *"Birnbaum did not bring either of his complaints about the sanctions order to the attention of the trial judge."*

NOT TRUE, as indicated by the various documents in this petition. Besides if the sanction order *"does not meet the requirements"*, that makes it UNLAWFUL, PERIOD.
(See **App. 6**, COA Opinion, section titled "Sanction Order")

Reply Brief - July 16, 2003

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"I am being punished for the sins of this entire proceeding. If, after reconsideration, this Court still feels that what I did was so sanctionable, **please advise me as to other views I am also not allowed to voice, whether to this Court, on Appeal, or elsewhere, lest I unknowingly risk being subjected to further sanctions** [for being a whistle-blower"

"I petition this Appeals Court to free me from the TWO unlawful judgments upon me, to reverse the unlawful "RICO relief" summary judgment, and to remand the case back to the trial court, with a recusal of Judge Paul

Banner, and in the alternative, very strong guidance as to due process in a civil RICO environment."

"This is really a very simple case once one recognizes the pattern of FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression and unlawful judgments against pro se Birnbaum for having made a civil racketeering ("civil RICO") defense against a fraudulent suit by lawyers.

Disposition: Lengthy appeals court opinion **(App.1 thru App. 9)**, but NO finding on the issue of **UNLAWFUL**.

Petition for Rehearing En Banc -- Nov. 12, 2003

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"Issues Presented in this *Petition for Rehearing En Banc*

1. Whether the Panel's Opinion is devoid of Constitutional considerations

- It is "clearly established that filing a lawsuit was constitutionally protected conduct " *Rutan* , 497 U.S. 62

2. Whether the Panel micro-procedurally upholds a patently unlawful $62,000 punitive sanction for having made a civil RICO (civil racketeering) pleading

- "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v. Feiock*, U.S. Supreme Court, 485 U.S. 624 (1988)

3. Whether the Panel micro-procedurally upholds a $59,000 judgment that does not conform to the pleadings and the verdict.

- It does not conform to the pleadings and the verdict (RCP Rule 301. Judgments)

"PRAYER and Conclusion

"The Panel's analysis is purely procedural, and devoid of Constitutional considerations. Nowhere does the Panel address my key point that assessing a punitive sanction for having made a civil RICO pleading violates the LAW.

"Through the prism of this UNLAWFUL judgment, it is also abundantly clear that the entire proceedings in the trial court were also unlawful, and that the **TWO** (2) judgments against me **should and must be officially declared null and void**.

"Assessing a [criminal] punishment of $62,255 for having made a civil RICO defense is NOT OBJECTIVELY REASONABLE either, and especially so in light of a finding that:

> *"Mr. Birnbaum may be **well-intentioned** and may believe that he **had** some kind of real claim as far as RICO there **was** nothing presented to the court in any of the proceedings since I've been involved that suggest he **had** any basis in law or in fact to support his [civil RICO] suits against the individuals"* (all completed acts, making the sanction purely punitive)

"Also, the Panel's analysis is out of step with the U.S. Supreme Court:

> *"[a] Congressional objective [in enacting civil RICO with treble damages] of encouraging civil litigation not merely to compensate victims but also to turn them into **private attorneys general**, supplementing Government efforts by **undertaking litigation in the public good**". Rotella v. Wood et al., 528 U.S. 549 (2000)*

Disposition: Rehearing En Banc **DENIED (App. 15)**

Federal questions in the Texas Supreme Court

(Petition to Texas Supreme Court No. 04-0078)

Note: Several original references to exhibits removed. Other references updated to reflect appendix with this petition. Emphasis as in the original documents.

Petition for Review -- Jan. 22, 2004

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"Question presented:

"Whether the precedent of a Texas court actually assessing a FINE of $62,000 (or ANY fine), merely because the evidence did NOT prove a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute, and offends the Constitution"

- "clearly established that filing a lawsuit was constitutionally protected conduct." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 , 76 n.8 (1990).

"Prayer presented:

"The Appeals Court's ***Opinion*** is a micro-procedural analysis devoid of Constitutional considerations. Nowhere does the Panel address my key point that assessing a punitive sanction for having made a civil RICO pleading actually violates the LAW.[2]

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[2] "It was, however, clearly established that **filing a lawsuit** was **constitutionally protected conduct** See Milhouse v. Carlson, 652 F.2 d 371, 37 3-74 (3d C ir. 1981); see also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois.*", 497 U.S. 62, 73 , 76 n.8 (1990).

"Upholding the assessment of a FINE of $62,000 (or ANY fine), merely because the evidence did NOT prove a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute:

> *"[a] Congressional objective [in enacting civil RICO with treble damages] of encouraging civil litigation not merely to compensate victims but also to turn them into **private attorneys general**, supplementing Government efforts by **undertaking litigation in the public good**". Rotella v. Wood et al., 528 U.S. 549 (2000)*

"It also sets a precedent of punishment for speaking out in a Texas court of law, and is an error of law of such importance to the state's jurisprudence that it should be corrected. RAP Rule 56.1(a)(5)"

Disposition: Petition for Review **DENIED (App. 14)**

Motion for Rehearing -- April 12, 2004

Issue: FIRST AMENDMENT, DUE PROCESS, STATUTORY LAW ("civil RICO")

"Even as this case is in the **Supreme Court of Texas**, **Hon. Ron Chapman**, by special assignment, is presiding in this cause in the **trial court**:

> "In the absence of ALL jurisdiction, TWO Senior ("visiting") judges, ONE hearing a motion to recuse the OTHER, ONE from the bench, the OTHER from the witness box, manage to assess a **$125,770 FINE** ("sanction") against Birnbaum, a 67 year old non-lawyer, on April 1, 2004! **(App. 21)**

"Furthermore, at the hearing, Judge Chapman issued the following warning:

> *"You (now) have the keys on whether there are any further proceedings in this case in the future. Please be aware that any further actions might result in* ***<u>further sanctions</u>****."* **(App. 22)**

"Also, this FINE ("sanction") is on top of an <u>unconditional</u> FINE of $62,885 by senior judge **Hon. Paul Banner** at a hearing on July 30, 2002 (<u>after</u> final JUDGMENT at the trial of April 11, 2002), where **Judge Banner** found Birnbaum **"well-intentioned"**, only that he did not see the evidence as showing Birnbaum's civil RICO claim. Birnbaum had of course asked for determination by JURY!

"<u>Unconditional punishment</u> (not "coercive") is of course UNLAWFUL by <u>civil</u> process.

"All this started with a 1995 fraudulent suit against Birnbaum over a **BEAVER** dam (not a cause of action!) The jury said ZERO damages, yet the lawyer wants $10,000 in legal fees, and **Judge Chapman** has JUST been assigned to the case! All "legal fees" and "legal fees" for collecting on fraudulent "legal fees"!

"At the time of such suit, Birnbaum, a retired electrical engineer, lived peaceably on his farm in Van Zandt County, taking care of his cows and ninety (90) year old invalid mother, and had only known the courthouse from getting auto license tags.

"This ***Petition*** (and this ***Motion for Rehearing***) is NOT about mere "error <u>in</u> the judgment of the court of appeals", but about "an error of law <u>committed</u> by the court of appeals of such importance to the jurisprudence

of the state as to require correction". (Tex. Gov't. Code § 22.001(a)(6))

"When a court of appeals upholds a $62,885 FINE for having made a civil RICO claim, it has committed an error of law against the First Amendment.

- "clearly established that filing a lawsuit was constitutionally protected conduct." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73, 76 n.8 (1990), **U.S. SUPREME COURT**

"When a court of appeals upholds an unconditional FINE of $62,885 imposed by civil process, it has committed an error of law against the Fifth Amendment.

- "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v. Feiock*, , 485 U.S. 624 (1988), **U.S. SUPREME COURT**

"When a court of appeals finds that a $62,885 FINE "does not meet the requirements of rule 13", yet states that "This error, however, may be waived", it has committed an error of law.
"Waived" means knowingly giving up a right. I surely did not knowingly give up my right regarding that unlawful fine.

"This case is about a pattern of abuse of the judicial system to run over a person who had enough faith in the judicial system to stand up for what is right.

"This case is about judicial officers, who know better, yet have chosen "to hell with the law, we got a man that is rocking our boat, and he needs to be stopped, never mind the Constitution".

"This is an issue of law that should be addressed by this court, and this case is as good as any to do it. When high officials start not going by the law, there soon follow the likes of Hitler, Mussolini, Stalin, Milosovich, Saddam, and who knows what next. History tells us such disease has proven fatal.

Disposition: Motion for Rehearing **DENIED** May 20, 2004. **(App. 14)**

REASONS FOR GRANTING CERTIORARI TO QUESTION 1:

Whether a person without a lawyer, filing a pleading in a Texas court under U.S.C. § 1964(c), ("civil RICO"), can be sanctioned as much as $62,885 merely because the evidence is found to be insufficient to show his claim.

Such sanction is patently UNLAWFUL because it is not a civil sanction at all, but a CRIMINAL sanction, imposed on Birnbaum without full due criminal process, including a finding beyond a reasonable doubt:

- "Whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." **U.S. Supreme Court** in *United Mine Workers v. Bagwell, 512 U.S. 821 (1994)*

- "The distinction between civil and criminal contempt has been explained as follows: The purpose of civil contempt is remedial and **coercive** in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and

therefore the civil contemnor carries the keys of (his) prison in (his) own pocket. In other words, it is civil contempt when one may procure his release by compliance with the provisions of the order of the court.

"Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being **punished** for some **completed act** which **affronted** the dignity and authority of the court. The **Texas Court of Criminal Appeals**, No. 73,986 (June 5, 2002)

So what had Birnbaum done? There was never a warning. The sanction order **(App. 16)** does not even hint at wrongs, stating only that *"the Court is of the opinion that [names] are entitled to prevail on their claim for sanctions"*. RCP Rule 13 of course prohibits sanctions *"except for good cause, the particulars of which **must** be stated in the sanction order"*. The only clue comes from the transcript of the sanctions hearing at which the trial judge certainly made no finding of "bad faith":

*"In assessing the sanctions, the Court has taken into consideration that although Mr. Birnbaum may be **well-intentioned** and may believe that he **had** some kind of real claim as far as RICO there **was** nothing presented to the court in any of the proceedings since I've been involved that suggest he **had** any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate."* Hearing on motions for sanctions, July 30, 2002. **(App. 12)**

The answer is that Birnbaum was sanctioned because he **"had"** made a civil RICO counterclaim in the case TWO years ago, a long ago **completed** act, that somehow now

suddenly *"affronted"* the judge, making the sanction a CRIMINAL sanction, imposed on him without full criminal process. (Note: They file counterclaims all the time, but not civil RICO)

Birnbaum had asked for trial by JURY, and the trial judge was no more entitled to weigh the evidence to make a finding that there was no RICO violation, and **sanction Birnbaum**, than he was entitled to find that there was a RICO violation, and **throw the Westfalls in jail**.

Furthermore, the right to file a lawsuit, without fear of retaliation, is a fundamental American right:

> "It was, however, clearly established that **filing a lawsuit** was **constitutionally protected conduct**. See Milhouse v. Carlson, 652 F.2 d 371, 37 3-74 (3d C ir. 1981); see also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois*.", 497 U.S. 62, 73 , 76 n.8 (1990).

The law on this matter is abundantly clear, and was presented to the Texas appeals judges again and again and again.

The judges upholding such $62,885 sanction knew that they were acting in violation of the Constitution, yet did it anyway, and such conduct rises to the level of judicial terrorism and a threat to the security of America.

This Court granting certiorari will provide strong incentive to Texas judges to go by the law.

REASONS FOR GRANTING CERTIORARI TO QUESTION 2:

Whether such person's civil RICO claim can be kept from the jury, and the TRIAL JUDGE himself just FIND that the evidence does NOT indeed show such civil RICO claim as pleaded, and impose such sanction of as much as $62,885?

The law on this was presented to all the judges again and again, and is abundantly clear. The Rules and the law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims.

> "**Material issues of genuine fact** existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such enterprise, association of the alleged enterprise with organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and the existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, 558 F.Supp.83.*

The judges upholding such summary judgment and $62,885 sanction knew that they were acting in violation of the Constitution, yet did it anyway, and such conduct rises to the level of judicial terrorism and a threat to the security of America.

This Court granting certiorari will provide strong incentive to Texas judges to go by the law.

REASONS FOR GRANTING CERTIORARI TO QUESTION 3:

Whether the Texas Supreme Court in upholding such $62,885 sanction sets a dangerous precedent that is in conflict with the purpose of the civil RICO statute.

The law on this was presented to all the judges again and again, and is abundantly clear:

> "**Any person injured in his business or property** by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *18 U.S.C. § 1964(c) "civil RICO"*

> "[a] congressional objective [in enacting civil RICO with treble damages] of encouraging civil litigation not merely to compensate victims but also to turn them into **private attorneys general**, supplementing Government efforts by **undertaking litigation in the public good**". *Rotella v. Wood*, 528 U.S. 549 (2000).

The judges striking down Birnbaum's civil RICO claim, and even punishing him for it **(App. 12, App. 16)**, knew that they were acting in violation of the law, yet did it anyway, and such conduct rises to the level of judicial terrorism and a threat to the security of America.

This Court granting certiorari will provide strong incentive to Texas judges to go by the law.

REASONS FOR GRANTING CERTIORARI TO QUESTION 4:

Whether the judges upholding such $62,885 sanction knew that they were acting in violation of the Constitution, yet did it anyway, and whether such conduct rises to the level of judicial terrorism and a threat to the security of America.

The Texas judges, from the trial court to the supreme court, were briefed again and again and again on the constitutional issues presented in this petition.

They knew that they were acting in violation of the law, yet did it anyway, and such conduct rises to the level of judicial terrorism and a threat to the security of America.

This Court granting certiorari will provide strong incentive to Texas judges to go by the law.

CONCLUSION

This petition is about FREE SPEECH, Fifth Amendment DUE PROCESS, and STATUTORY LAW.

The Texas 294th District Court, the Texas Fifth Court of Appeals, and the Texas Supreme Court, using various Texas legal procedures and doctrines, have decided an important federal question in a way that conflicts with relevant decisions of this Court.

This $62,885 sanction judgment at issue is NOT a matter of an erroneous ruling or finding, NOT with all the briefing

and petitions for rehearing that went to the Texas courts, as shown above, but an indication of a more systemic problem and pattern of disregard of constitutional rights and due process, rising to the level of an "important issue of law".

It is not often, that a case of such gross abuse of the judicial system is so clearly documented, with NO damages of ANY kind at the bottom, only "legal fees" and "legal fees" for collecting on fraudulent "legal fees".

If this Court does not act on a case such as this, the abuse of our judicial system will go on and on and on.

As an example, I provide the latest "case law" by the Texas Fifth Court of Appeals, in which they blithely make up the "facts":

> "The rules of appellate procedure require appellant's brief to contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(h). An issue on appeal **unsupported by argument or citation to any legal authority** presents nothing for the court to review. ***BIRNBAUM v. Law Offices of G. David Westfall***, 120 S.W.3d 470, 477 (Tex. App.-Dallas 2003, pet. filed)"
> (Fifth District of Texas at Dallas, *Dorothy Strange v. Continental Casualty Company*, No. 05-03-00348-CV, January 29, 2004)

Respectfully submitted,

UDO BIRNBAUM, PRO SE
540 VZCR 2916
Eustace, TX 75124
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APPENDIX A

File: 021683F - From documents transmitted: 10/23/2003
AFFIRMED; Opinion issued October 23, 2003

In The
Court of Appeals
Fifth District of Texas at Dallas

.....

No. 05-02-01683-CV

.....

UDO BIRNBAUM, Appellant
V.
THE LAW OFFICES OF G. DAVID WESTFALL, P.C.,
G. DAVID WESTFALL,
CHRISTINA WESTFALL, AND STEFANI PODVIN,
Appellees

.....

On Appeal from the 294th Judicial District Court
Van Zandt County, Texas
Trial Court Cause No. 00-00619

.....

OPINION

Before Justices Whittington, Wright, and Bridges
Opinion By Justice Whittington

Appellant Udo Birnbaum appeals a jury verdict and judgment in favor of appellee The Law Offices of G. David Westfall, P.C. ("Law Office"). Birnbaum also appeals orders on motions for summary judgment, for sanctions, and to recuse the trial judge, and complains of the trial judge's failure to appoint an auditor. We affirm.

Background

Law Office filed a suit on a sworn account against Birnbaum for legal fees allegedly owed. Birnbaum filed an

answer and affidavit denying the claim. Birnbaum also filed a counterclaim against Law Office and added G. David Westfall, Christina Westfall, and Stefani Podvin as parties to the lawsuit ("Third Party Defendants"). He alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (2000 and Supp. 2003) ("RICO") against Third Party Defendants. Law Office and Third Party Defendants moved for summary judgment on the claims against them. Third Party Defendants' motions were granted. Birnbaum filed motions to appoint an auditor and to recuse the trial judge. There is no order on Birnbaum's motion to appoint an auditor in the clerk's record. At trial, a jury made affirmative findings on Law Office's claim against Birnbaum for breach of contract and negative findings on Birnbaum's claim against Law Office for violations of the Texas Deceptive Trade Practices Act. Tex. Bus. & Com. Code Ann. §§ 17.41 *et seq.* (Vernon 2002) ("DTPA"). The trial judge entered judgment for Law Office which included an award of attorneys' fees as found by the jury. Third Party Defendants filed a motion for sanctions under Rule 13 of the Texas Rules of Civil Procedure, which was granted in part and denied in part. The partial reporter's record submitted with this appeal is the closing argument from the jury trial and a portion of the sanctions hearing. Birnbaum has appeared *pro se* throughout all proceedings.

Judgment

In his first issue, Birnbaum asserts the trial court's judgment on the jury's verdict was "unlawful" because (1) the trial judge erred in refusing to submit jury issues on whether Birnbaum was excused from performing the attorney's fees contract and whether Law Office's services were of no worth; and (2) the judgment does not conform to the pleadings because the jury was questioned regarding a breach of contract but Law Office pleaded a suit on sworn account. Because Birnbaum filed only a partial reporter's

record limited to closing argument and a portion of the sanctions hearing, we are unable to review these complaints. *See Nicholes v. Tex. Employers Ins. Ass'n*, 692 S.W.2d 57, 58 (Tex. 1985) (per curiam) (with only partial reporter's record, court could not determine whether giving improper jury instruction was harmful error); *A.V.A. Servs., Inc. v. Parts Indus. Corp.*, 949 S.W.2d 852, 854 (Tex. App.-Beaumont 1997, no pet.) (nothing preserved for review on issue whether judgment conformed to pleadings, because complaint could not be raised for first time on appeal, and without reporter's record, no showing made that appellant received trial court determination on issue). We overrule appellant's first issue.

Appointment of Auditor

In his second issue, Birnbaum urges the trial court erred in failing to appoint an auditor pursuant to Rule 172 of the Texas Rules of Civil Procedure. While Birnbaum did file a motion to appoint an auditor with the trial court, he did not receive a ruling on the motion. Therefore, he did not preserve this complaint for appeal. *See* Tex. R. App. P. 33.1; *Reyna v. First Nat'l Bank*, 55 S.W.3d 58, 67 (Tex. App.-Corpus Christi 2001, no pet.). We overrule appellant's second issue.

Summary Judgment

Birnbaum next complains of the trial court's no-evidence summary judgment on his RICO claims. We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict, to determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 832-33 (Tex. App.-Dallas 2000, no pet.)

Birnbaum asserted claims under sections 1962(a) and (c) of RICO. Under subsection (a), a person who has received income from a pattern of racketeering cannot invest

that income in an enterprise, and under subsection (c), a person who is employed by or associated with an enterprise cannot conduct the enterprise's affairs through a pattern of racketeering. *See Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 231 n.2 (5th Cir. 2003). Elements common to all subsections of RICO are: (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Whelan*, 319 F.3d at 229.

"Racketeering activity" is defined in section 1961(1) in terms of a list of state and federal crimes. *See* 18 U.S.C. § 1961(1); *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F. Supp. 995, 1001 (S.D. Tex. 1995). It includes acts indictable under 18 U.S.C. § 1341, relating to mail fraud. *See* 18 U.S.C. § 1961(1)(B); *Whelan*, 319 F.2d at 231. The individual acts of "racketeering activity" are usually described as the "predicate offenses." *Bonton*, 889 F. Supp. at 1001. Any act that does not fall within RICO's definition of predicate offenses is not "racketeering activity." *See Heden v. Hill*, 937 F. Supp. 1230, 1242 (S.D. Tex. 1996).

A "pattern of racketeering activity" requires at least two acts of racketeering activity. *See Whelan*, 319 F.3d 231 n.4. Although at least two acts of racketeering are necessary to constitute a pattern, two acts may not be sufficient. *Bonton*, 889 F. Supp. at 1003. To establish a pattern of racketeering activity, a plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). To establish continuity, plaintiffs must prove continuity of racketeering activity, or its threat. *Word of Faith*, 90 F.3d at 122.

Birnbaum asserts Law Office is a RICO enterprise through which Third Party Defendants conducted a pattern of racketeering. He alleges Third Party Defendants

conducted a scheme whereby Law Office's clients were encouraged to file RICO suits against public officials, but failed to receive "honest service" or regular billing. Birnbaum asserts Third Party Defendants engaged in mail fraud in furtherance of this scheme because "almost every document on file in this case" was mailed at one time, including the fraudulent bill on which Law Office's claim was premised. Thus, he alleges the predicate act for purposes of RICO was mail fraud.

Mail fraud under 18 U.S.C. section 1341 "requires that (1) the defendant participate in a scheme or artifice to defraud, (2) the mails be used to execute the scheme, and (3) the use of the mails was 'caused by' the defendant or someone else associated with the scheme." *Bonton*, 889 F. Supp. at 1002. As noted in *Bonton*, "[a] RICO claim asserting mail fraud as a predicate act must allege how each specific act of mail fraud actually furthered the fraudulent scheme, who caused what to be mailed when, and how the mailing furthered the fraudulent scheme." *Bonton*, 889 F. Supp. at 1002. The mail fraud statute "does not reach every business practice that fails to fulfill expectations, every breach of contract, or every breach of fiduciary duty." *Bonton*, 889 F. Supp. at 1002-1003. A plaintiff may not convert state law claims into a federal treble damage action simply by alleging that wrongful acts are a pattern of racketeering related to an enterprise. *Heden*, 937 F. Supp. at 1242.

As summary judgment evidence, Birnbaum filed affidavits of several unhappy clients of Law Office. Although Birnbaum also referred to deposition testimony and pleadings from other lawsuits in his summary judgment response, this evidence was not submitted to the trial court. *See Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 42 (Tex. App.-Houston [14th Dist.] 2000, pet. denied) (verified summary judgment response was not summary judgment proof).

Birnbaum's summary judgment evidence establishes that several Law Office clients were encouraged to file RICO suits and did not receive regular billings from Law Office. Birnbaum alleges a scheme to defraud himself and others through these suits, and he offers his affidavit testimony to establish the bill mailed to him by Law Office was fraudulent. He does not, however, offer summary judgment evidence regarding how mailing this fraudulent bill constitutes a pattern of racketeering activity, or furthers a "recognizable scheme formed with specific intent to defraud," or presents a continued threat of criminal activity. *See Bonton*, 889 F. Supp. at 1003; *see also Word of Faith*, 90 F.3d at 122-24 (no continuity where alleged predicate acts are part of a single, lawful endeavor). Further, Birnbaum did not offer summary judgment evidence that Third Party Defendants invested income from a pattern of racketeering activity in the alleged RICO enterprise or that his injury flowed directly from the use or investment of that income. Without such evidence, Birnbaum did not raise a genuine issue of material fact on his claim under RICO § 1962(a). *See Nolen v. Nucentrix Broadband Networks, Inc.*, 293 F.3d 926, 929 (5th Cir.), *cert. denied*, 537 U.S. 1047 (2002) (for section 1962(a) claim, alleging injury from predicate racketeering acts themselves insufficient; injury must flow from use or investment of racketeering income). Summary judgment on Birnbaum's RICO claims was proper. We overrule Birnbaum's third issue.

Sanctions Order

In his fourth issue, Birnbaum complains of the order imposing sanctions against him in favor of Christina Westfall and Podvin. He argues the sanction order is unlawful because it is a criminal sanction "imposed without full due criminal process," and does not state the basis for the sanctions award as required by rule 13 of the Texas Rules of Civil Procedure. **We agree with Birnbaum that the trial**

court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13. *See Murphy v. Friendswood Dev. Co.*, 965 S.W.2d 708, 709- 10 (Tex. App.-Houston [1st Dist.] 1998, no pet.) ("Rule 13 is clear: the particulars of good cause 'must be stated in the sanction order.' . . .[T]he order here did not recite the particular reasons supporting good cause to issue the sanctions and did not include findings of fact and conclusions of law supporting good cause . . . we hold that the sanction order does not comply with Rule 13."). This error, however, may be waived. *See McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 756 (Tex. App.-Dallas 1993, no writ). Birnbaum did not bring either of his complaints about the sanctions order to the attention of the trial judge. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. *See* Tex. R. App. P. 33.1. An objection must not only identify the subject of the objection, but it also must state specific grounds for the ruling desired. Without a proper presentation of the alleged error to the trial court, a party does not afford the trial court the opportunity to correct the error. *See McCain*, 856 S.W.2d at 755. While Birnbaum filed a motion to reconsider the sanctions, he did not object to the specificity of the order or to the criminal nature of the sanctions. Birnbaum's only complaint about the specificity of the order was made in an untimely request for findings of fact and conclusions of law filed more than twenty days after the date of the sanctions order. *See* Tex. R. Civ. P. 296 (request for findings of fact and conclusions of law shall be filed within twenty days after judgment is signed). Therefore, the trial judge did not have the opportunity to correct the erroneous order, and error was not preserved. *See McCain*, 856 S.W.2d at 755. Appellees have since filed a motion to allow filing of findings of fact

and conclusions of law by the trial judge regarding the sanctions order, which was opposed by Birnbaum. We need not reach the question of whether the findings and conclusions may be filed at this time, as Birnbaum did not preserve his complaints about the sanctions order. We overrule appellant's fourth point of error.

Recusal of Trial Judge

Birnbaum complains the trial judge should have been recused. An evidentiary hearing was held before Judge Ron Chapman on Birnbaum's motion to recuse Judge Paul Banner, and Judge Chapman denied the motion. No reporter's record of this hearing is included in our record. Without a record of the proceedings, we cannot review Judge Chapman's order for abuse of discretion, and nothing is presented for review. *See Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 445 (Tex. App.-El Paso 1994, writ denied); *In re M.C.M.*, 57 S.W.3d 27, 33 (Tex. App.-Houston [1st Dist.] 2001, pet. denied); Tex. R. Civ. P. 18a (f). Appellant's fifth point of error is overruled.

Fraud

In his sixth issue, Birnbaum complains of "fraud, fraud, and more fraud." In his argument in support of this issue, he contends he made no agreements with Law Office regarding attorneys' fees and never accepted the terms of the retainer agreement. The issue regarding any contractual relationship between Birnbaum and Law Office was resolved by the jury. We have no record of the testimony relevant to Birnbaum's acceptance of the contract. Therefore, we presume the omitted portions of the record support the trial court's judgment. *See Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991) (per curiam) (in absence of a complete statement of facts, it is presumed that omitted evidence supports trial court's judgment). Birnbaum's sixth issue is overruled.

Due Process

In his seventh issue, Birnbaum contends "due process demands a new trial." The argument presented does not contain citation to authority and complains of the same rulings addressed in other parts of his brief. This issue presents nothing for our review. *See* Tex. R. App. P. 38.1 (h) (brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and to the record). In his reply brief, Birnbaum also complains of incurable jury argument, and includes a reporter's record of the closing argument from trial in the appellate record. However, the record reveals Birnbaum did not object to the argument at the time it was made, and so has failed to preserve error. *See Barras v. Monsanto Co.*, 831 S.W.2d 859, 865 (Tex. App.-Houston [14th Dist.] 1992, writ denied) (complaint of error in closing argument waived by failure to object). Birnbaum's seventh issue is overruled.

Having overruled Birnbaum's issues, we affirm the judgment and orders of the trial court.

/s/ Mark Whittington

MARK WHITTINGTON
JUSTICE

021683F.P05

NOTE:
Emphasis added to section titled *Sanction Order* (App. 6, App. 7), as replicated below:
"We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13."

APPENDIX B

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

UDO BIRNBAUM, Appellant No. 05-02-01683-CV v. THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL, CHRISTINA WESTFALL, and STEFANI PODVIN, Appellees	Appeal from the 294th District Court of Van Zandt County, Texas. (Tr. Ct. No. 00-00619) Opinion delivered by Justice Whittington, Justices Wright and Bridges participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellees THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL, CHRISTINA WESTFALL, and STEFANI PODVIN recover their costs of this appeal from appellant UDO BIRNBAUM.

Judgment entered October 23, 2003

/s/ Mark Whittington

MARK WHITTINGTON
JUSTICE

APPENDIX C

This Order had removed all THREE Westfalls (G. David, Christina, and Stefani (Westfall) Podvin from the case in Nov. 2001. Yet in May 2002, they come back for a "second bite at the apple" with their $62,885 motion for sanctions!

THE LAW OFFICES OF G. DAVID WESTFALL, P.C	§	**IN THE DISTRICT COURT**
	§	
	§	
v.	§	**294th JUDICIAL DISTRICT**
	§	
UDO BIRNBAUM	§	**VAN ZANDT COUNTY, TEXAS**

ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT

On the 7th day of September 2001 came on to be heard the Motions for summary Judgment of The Law Offices of G. David Westfall, P.C, G. David Westfall, Christina Westfall and Stefani Podvin in the above-styled and numbered cause. The court having read the Motions together with the responses thereto, having ruled on the objections to the summary judgment evidence and having heard the argument of counsel and of the pro se parties is of the opinion that the Motions are well taken and should be in all things granted.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment of The Law Offices of G. David Westfall, P.C. be sustained as to RICO claims and that the Motion for summary judgment of G. David Westfall be in all things sustained and that the Motions for summary Judgment of Christina Westfall and Stefani Podvin be in all things sustained.

SIGNED *this the* 13 *day of* November, *2001*

/s/ Paul Banner

JUDGE PRESIDING

EXHIBIT D
Transcription of sanctions hearing
(emphasis added)

REPORTER'S RECORD
TRIAL COURT CAUSE NO. 00-619

G. DAVID WESTFALL	)	IN THE DISTRICT COURT
VS.	)	VAN ZANDT COUNTY, TEXAS
UDO BIRNBAUM	)	294TH JUDICIAL DISTRICT

****
EXCERPTS FROM HEARING HELD 7-30-02
****

Starting page 6:

THE COURT: -- each of the three cross defendants. First off is I will grant no sanction as it has to do with the filing of a motion to recuse this trial judge -- this assigned trial judge, as far as I'm concerned, with the exception of whatever might be included by way of attorney's fees. All right. I've entered final judgment in this case, which the parties will be given a copy and take whatever action each of you may deem appropriate thereafter. As far as Mrs. Westfall's claim for sanctions --

MR. FLEMING: Mrs. or Miss?

THE COURT: -- Mrs. Westfall I will find that there is $1,000 in actual damages, that joint and severally the reasonable attorneys' fees of $50,085 that's ordered against Mr. Birnbaum together with a $5,000 **punitive award**. As to Miss Podvin, $1,800 in actual damages, $5,000 in punitive and the joint and several $50,085 in attorneys' fees. Mr. Birnbaum's sanctions as against Mr. Fleming or against the P.C. is denied and nothing is ordered.

In assessing the sanctions, the Court has taken into consideration that although Mr. Birnbaum may be **well-intentioned** and may believe that he **had** some kind of real claim as far as RICO there **was** nothing presented to the

court in any of the proceedings since I've been involved that suggest he **had** any basis in law or **in fact** to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate. And if you will provide me with an appropriate sanctions order, I will reflect it.

Shortly thereafter:

"THE COURT: **Now, I am told that this Court should not engage in the discussion of why the Court did or didn't do something**. The testimony, as I recall ... ...

On the 30th day of July, 2002, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Paul Banner, Judge Presiding, held in Canton, Van Zandt County, Texas:

Proceedings reported by machine shorthand."

APPEARANCES

Mr. Frank C. Fleming
LAW OFFICES OF FRANK C. FLEMING
6611 Hillcrest Avenue, #305
Dallas, Texas 75206-1301
(214) 373-1234
APPEARING ON BEHALF OF THE PLAINTIFF

Mr. Udo Birnbaum
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929
APPEARING PRO SE

APPENDIX E
Rule 14.1(i)(iii) "any order on rehearing"

IN THE SUPREME COURT OF TEXAS

NO. 04-0078 **Van Zandt County,**
UDO BIRNBAUM **5th District.**
v.
THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.,
ET AL.

March 26, 2004

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

May 21, 2004

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

* * * * * * * * * *

I, ANDREW WEBER, Clerk of the Supreme Court of Texas, do hereby certify that the above attached is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, UDO BIRNBAUM, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 2nd day of June, 2004.

/s/ Andrew Weber (stamp)
Andrew Weber, Clerk
By Gena Pelham, Deputy Clerk

APPENDIX F
Rule 14.1(i)(iii) "any order on rehearing"

Order issued December 10, 2003

In The
Court of Appeals
Fifth District of Texas at Dallas
No. 05-02-01683-CV

UDO BIRNBAUM, Appellant
V.
THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL, CHRISTINA WESTFALL, AND STEFANI PODVIN, Appellees

ORDER

Before Justices Whittington, Wright, and Bridges
Appellant's Motion for Rehearing En Banc filed November 5, 2003, is **DENIED**.

/s/ Mark Whittington

MARK WHITTINGTON
JUSTICE

APPENDIX G
Rule 14.1(i)(iv) "judgment sought to be reviewed"
($62,885 unconditional (not coercive) sanction by purely civil process)

G. DAVID WESTFALL, P.C	§	
Plaintiff	§	
v.	§	
UDO BIRNBAUM	§	294th JUDICIAL DISTRICT
Defendant/Counter-Plaintiff	§	
	§	
G. David Westfall, Christina Westfall,	§	
and Stefani Podvin	§	VAN ZANDT COUNTY,
Counter-Defendants	§	TEXAS

ORDER ON MOTIONS FOR SANCTIONS

On July 30, 2002, came on to be heard, Motions for Sanctions filed by G. David Westfall, Christina Westfall, and Stefani Podvin, as well as to be heard Motions for Sanctions filed by Udo Birnbaum. The plaintiff, The Law Office of G. David Westfall, P.C. (the "Plaintiff"), appeared in person by representative and by attorney of record. The defendant, Udo Birnbaum, appeared in person, pro se. The counter-defendant, G. David Westfall, appeared by representative and by attorney of record. The counter-defendants, Christina Westfall and Stefani Podvin appeared in person and by attorney of record. All parties announced ready for a hearing on all the pending motions for sanctions currently on file in this matter at the time of the hearing.

Based upon the pleadings of the parties, the evidence presented at trial and the evidence presented at the sanctions hearing, and the arguments of counsel and by the pro se defendant, the Court is of the opinion that the Movants, Christina Westfall and Stefani Westfall are entitled to prevail on their claim for sanctions against the Defendant, Udo Birnbaum.

It is therefore, **ORDERED, ADJUDGED and DECREED** that the Counter-Defendants, Christina Westfall and Stefani Podvin are awarded damages as a sanction against and to be paid by defendant, Udo Birnbaum, to Christina Westfall and Stefani Podvin as follows:

A. Christina Westfall and Stefani Podvin are awarded jointly and severally the amount of $50,085.00 as reimbursement for their joint attorney's fees.

B. Christina Westfall is awarded actual damages for her personal inconvenience in the amount of $1,000.00, and she is further awarded punitive damages for the harassment caused to her in the amount of $5,000.00.

C. Stefani Podvin is awarded actual damages for her personal inconvenience in the amount of $1,800.00, and she is further awarded punitive damages for the harassment caused to her in the amount of $5,000.00.

D. The Court denies the request for a finding of any sanctions to be awarded in favor of G. David Westfall, individually.

E. The Court denies the request for a finding of any sanctions to be awarded in favor of Udo Birnbaum.

IT IS FURTHER ORDERED THAT the judgment here rendered shall bear interest at the rate of ten percent (10%) from July 30, 2002, until paid.

All other relief regarding any motions for sanctions on file in this matter not expressly granted in this order is hereby denied.

THIS JUDGMENT RENDERED ON JULY 30, 2002, AND SIGNED THIS 9 day of August, 2002.

/s/ Paul Banner
JUDGE PRESIDING

APPENDIX H

Rule 14.1(i)(v) "when federal (First Amendment) questions were raised" (Filed, pleaded at sanctions hearing)

THE LAW OFFICES OF	§	IN THE DISTRICT COURT
G. DAVID WESTFALL, P.C	§	294th JUDICIAL DISTRICT
	§	VAN ZANDT COUNTY, TEXAS
v.	§	
	§	Heari fgr July 30, 2002
UDO BIRNBAUM	§	Hon. Paul Banner, by assignment

CLOSING PLEADING IN WRITING

This is not the only unfounded case upon me in this Court. There is the underlying "beaver dam" scheme case. That one resulted in a federal case against the judge of the 294th, Tommy Wallace, the Van Zandt District Attorney, and others alleging participation in corrupt court process and a pattern of racketeering activity round and about our Courthouse. That one went all the way up to the U.S. Supreme Court. The 'bill" in this suit is alleged additional fees in the federal civil racketeering suit.

And the 'beaver dam" case, started in 1994, trial in 1998 with a verdict, still hangs in this Court, without judgment, and the judge has disappeared.

Those matters, as well as this case, are the basis of my letter to the Senate Committee on the Judiciary. (No. 22)

It is now clear to me that the entire matters I have been subjected to in this Court is retaliation by official oppression for having spoken out on an issue of great public importance, namely rampant corruption and lawlessness in Judge Tommy C. Wallace's 294th District Court.

UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

APPENDIX J
Rule 14.1(i)(v) "when federal (First Amendment) questions were raised"

THE LAW OFFICES OF G. DAVID WESTFALL, P.C	§	IN THE DISTRICT COURT
	§	294th JUDICIAL DISTRICT
	§	VAN ZANDT COUNTY, TEXAS
v.	§	
	§	Heari fgr July 30, 2002
UDO BIRNBAUM	§	Hon. Paul Banner, by assignment

Notice of Past Due Findings of Fact and Conclusions of Law

(Emphasis as in original)

Request for Findings of Fact and Conclusions of Law was filed on September 3, 2002. Per RCP Rule 297 such ***Findings of Fact and Conclusions of Law*** were due within 20 days of such filing, i.e. on September 23, 2002. This Notice is within thirty (30) days of the initial request.

Your Honor, please let the record know what ***findings of fact***, and ***conclusions of law*** you made to come up with the **two** judgments you awarded against me in this case:

1. How, upon a pleading of an **unpaid open account**, and absent a finding to you by an Auditor under RCP Rule 172 regarding such claimed **unpaid open account**, and absent a finding by a jury as to the **state of the account**, what ***findings of fact***, and what ***conclusions of law*** did you make to award a judgment totaling **$59,280.66** against me upon such pleading, **an issue I had asked to be resolved by jury**?

2. How upon my cross and counter claim under 18 U.S.C. § 1961, *et seq.* ("civil RICO"), against three (3) persons, and having **dismissed such three (3) persons** on November 13, 2001, what ***findings of fact*** and what ***conclusions of law*** did you **now make**, on August 21, 2002, so as to entitle these **dismissed** parties to a **$62,885.00** second judgment against me, in the same case, on **an issue I had asked to be resolved by jury**?

Details in:

- ***Request for Findings of Facts and Conclusions of Law***
- ***Motion to Reconsider the $59,280.66 Judgment***
- ***Motion to Reconsider the $62,885.00 "Frivolous Lawsuit" Sanction Against Me***
- ***Motion for New Trial***
- ***Supplement to Motion for New Trial***
- ***First Amended Notice of Appeal.***

UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

BEST AVAILABLE COPY

CIVIL DOCKET

CASE NO. 00-00619

BAR INC., DALLAS FORM CD

NUMBER OF CASE	STYLE OF CASE	ATTORNEYS	KIND OF ACTION	DATE OF FILING Month	Day	Year
00-00619	The Law Offices of G. David Westfall			09	21	00
	VS.	G. David Westfall, Plaintiff.	dvbt			
FEE BOOK Vol. / Page	Udo Burnbaum			Jury Demanded by		
		Defendant.		Jury Fee, $		
				Paid by		

DATE OF ORDERS Mo.	Day	Year	ORDERS OF COURT	Minute Book Vol.	Page	PROCESS
1	26	2001	Judge Barnes Appointed			
6	20	01	PT- PP			
9	7	01	X Def's M/Summary Jdmt.			
10	1	01	all parties present. Evidence presented on Δ's Motion to Recuse. Both sides rest & close. Arguments presented. Δ's motion to recuse is (NC) insufficient at law and is untimely, and if it is not, Δ's evidence fails to establish any grounds in its favor, and therefore, the Ct. denies the motion on its merits. Ct. takes issue of Sanctioning Movant Burnbaum, under advisement			
			Judge Ron Chapman			

App. 21
APPENDIX K
See REVERSE side

I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.
By _____

VS. No.

Date of Orders Month	Day	Year	ORDERS OF COURT CONTINUED	Minute Book Vol.	Page
4	8	02	C/R All present; Jury selected, sworn in, struck; Open Stmts, Evid Recess		
4	10	02	C/R all present; Evid contd		
4	11	02	C/R all present; Evid contd Jury Verdict		
7	30	02	C/R all present J dnt signed	156	228
3	17	03	Order for 5th Court of Appeals - clerks Record		
4	1	04	[redacted] Movant Birnbaum P.R.O. and Sr atty Fleming representing Π are present. Hearing conducted on Birnbaum's Motion to Recuse filed 9/30/03. Testimony presented. Both sides rest. Arguments presented. Motion to recuse is in all things denied. Hearing held on Π's Motion for Sanctions filed this date. Testimony presented. Both sides rest. Arguments presented. Ct finds, based on the arguments, testimony, and pleadings that grounds for sanctions do exist and the Ct [redacted] assesses said sanctions for Δ's violation of Rule 13 of the TRCP and/or Section 10.001 et seq. TCPRC in the amount of $1,000- for actual damages and $124,770- for exemplary damages against Δ Birnbaum who is ordered to pay said sums to Π. Π's atty is instructed to draft a proposed Order for Judge Ralston and submit a copy of same to Δ.		

$124,770 exemplary sanction — by civil process — Twenty (20) months after final judgment

App. 21
APPENDIX K

I hereby certify this to be a true and correct copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.